U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 30Sep2002

CASE NO.: 2001-CAA-4

IN THE MATTER OF

CHRISTINE EVANS
Complainant,

v.

BABY-TENDA
a/k/a BABEE-TENDA
a/k/a TENDA,
Respondent

APPEARANCES:

Dale L. Ingram, Esquire
204 West Linwood Blvd.
Kansas City, MO 64111
For the Complainant

S. Ruth Lehr, Esquire
4505 Madison
Kansas City, MO 64111
For the Respondent

BEFORE: ROBERT J. LESNICK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Clean Air Act (hereinafter the CAA), 42 U.S.C. § 7622(a) (1994). The relevant portions of the CAA provide:

> No employer may discharge any employee or otherwise discriminate against such employee with respect to his compensation, terms, conditions or privileges of employment because the employee-

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
(2) testified or is about to testify in any such proceeding, or
(3) assisted or participated or is about to assist or participate in any matter in such a proceeding or in any other action to carry out the purposes of this chapter.

PROCEDURAL HISTORY

On April 4, 2000, Christine Evans (Complainant) filed a timely complaint with the U.S. Department of Labor, Occupational Safety and Health Administration alleging that Respondent, Baby-Tenda, through the acts of its management, had engaged in acts of retaliation, harassment, and ultimately, termination from her employment in violation of the CAA, 42 U.S.C. § 7622(a), and the pertinent regulations, 29 C.F.R. Part 24. Complainant worked for Respondent from on or about March 1, 1999, until her termination on March 8, 2000.

The Department of Labor Investigator concluded that Evans was terminated because she engaged in protected activity within the scope of the CAA and recommended remedial action (CX 1, at 24). A Notice of Appeal was timely filed by Respondent on October 24, 2000. Further, Respondent alleged that the DOL had failed to comply with 42 U.S.C. 7622(a). Subsequently, Respondent filed a Motion to Dismiss the Complaint on February 28, 2001. Following a motion by Complainant for an extension of time to respond to Respondent's Motion of Dismissal, the Motion to Dismiss was denied on July 12, 2001.

A Notice of Hearing was sent to all parties on February 8, 2001, setting a hearing date for April 9, 2001. Respondent filed a Motion to Continue the Hearing on February 26, 2001, which was granted on March 8, 2001. Hearing on the matter was then rescheduled for November 5 and 6, 2001. Pre-Hearing submissions were received by Complainant and Respondent.

On November 1, 2001, Respondent filed a Motion in Limine and Suggestions in Support of the Motion. Complainant filed a Response to Respondent's Motion in Limine at the commencement of the hearing on November 5, 2001. At the hearing the following evidence was entered into the record: Respondent's Exhibits 1 through 11, 17 through 19, 21, 24, and 25; Administrative Law Judge's Exhibits 1 & 2; and Complainant's Exhibit 1. The following abbreviations shall be used herein: ALJ EX for an Exhibit offered by the Administrative Law Judge; CX for a Complainant's Exhibit; RX for a Respondent's Exhibit; and TR for transcript followed by the page number.

At the commencement of the hearing, I made three rulings in connection with Respondent's Motion in Limine.

1. This court has no jurisdiction over OSHA matters and thus testimony or reference to or conclusions by Complainant regarding an OSHA investigation that took place at Respondent's business in October 1999 relating to defective equipment is not relevant to these proceedings (TR. 10-15).

2. Investigative reports are self-authenticating.

3. Testimony relating to Respondent's past retaliation for matters involving OSHA is admissible as they go to Respondent's credibility and disposition.

POST HEARING SUBMISSIONS

1.	Respondent's Proposed Findings of Fact, Conclusions of Law	01/10/02
2.	Complainant's Post-Hearing Brief	01/14/02
3.	Respondent's Motion to Strike Complainant's Post-Hearing Brief	01/17/02
4.	Respondent's Reply Brief	01/17/02
5.	Complainant's Objection to Respondent's Motion to Strike	01/22/02
6.	Complainant's Response to Respondent's Post-Hearing Brief	01/22/02
7.	Respondent's Reply To Court's Show Cause Order	04/29/02

In order to establish a case of discrimination under the environmental statutes, a complainant must show: 1) that he or she is an employee of a covered employer; 2) that he or she engaged in protected activity; 3) that thereafter he or she was subjected to adverse action regarding his or her employment; 4) that the respondent knew about the protected activity when it took the adverse action; and 5) that the protected activity was the reason for the adverse action. *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 , slip op. at 11 n.9 (Sec'y Feb. 15, 1995), aff'd sub nom., *Carroll v. United States Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996).

The findings and conclusions which follow are based upon the observations by this tribunal of the appearance and demeanor of the witnesses who testified at the hearing as it affects their credibility, and upon an analysis of the entire record, including the testimony and documentary evidence, in light of the arguments presented, the statutory law, applicable regulations, and applicable case law.

ISSUES

1. Whether Complainant engaged in protected activity under the Act;

2. Whether the Respondent knew or had knowledge that the Complainant engaged in protected activity;

3. Whether Respondent committed adverse action against Complainant;

4. Whether the actions taken against the Complainant were motivated, at least in part, by Complainant's engagement in protected activity; and

5. What damages, if any, the Complainant is entitled to as a result of the retaliatory actions taken by the Respondent.

TESTIMONIAL EVIDENCE

Christine Evans

In March of 1999, Complainant was hired by Respondent to put creases in the legs of chairs (TR 227). Shortly thereafter, Complainant was transferred to another area of the plant and trained as a sander (TR 227). Complainant described the work environment as friendly and having a good atmosphere where everyone talked to each other (TR 229).

Within the first few months of her employment, Complainant became concerned about work conditions and notified OSHA about those concerns (TR 230). Specifically, Complainant cited three safety issues to OSHA. The first addressed the lack of guard catches on some of the equipment, the second addressed an employee on the job injury, and the third, paint fumes escaping from the plant to the outside air (TR 231).[1] Complainant described the paint room as a large open room with nothing more than a piece of plastic covering one open doorway with the door at the opposite end being open most of the time (TR 231).

After she filed the complaint, OSHA investigators arrived to inspect the plant. Complainant testified that she was moved from her location and placed in another part of the building away from the inspectors (TR 233). As a result of this move, Complainant did not speak with any of the inspectors. Complainant did see one of the inspectors accompany Respondent over to the paint room and inspect that area (TR 235).

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[1] The parties stipulated that the first two areas of concern deal strictly with employee safety and fall under OSHA and not CAA; therefore, this tribunal has no jurisdiction over those matters and they are not presently before this court.

Complainant testified that during the investigation, Mr. Collins, the plant manager, approached her and wanted to know what she would say to the OSHA inspectors if asked any questions. Complainant felt that if she told the truth she would lose her job immediately; yet, she stated that she would not lie for anyone, even if it cost her her job (TR 235-236).

Complainant lived with Kenneth Neff for approximately two years. Mr. Neff started working for the Respondent after Complainant. Complainant and Mr. Neff rode to and from work together every day until sometime in February 2000. At this time, Mr. Neff would take a spare set of clothes to work with him, come home late, go directly to the shower, and then wash his clothes (TR 238). Complainant described Mr. Neff's clothes as being dusty when he returned home and that tiny fibers could be seen on them (TR 301-303).

After several attempts to determine what Mr. Neff was doing while working late, Complainant finally cornered him and he told her that he was helping Mr. David Jungerman, Respondent's President, remove asbestos from the plant. Mr. Neff told Complainant that he was being paid very well, in cash every night (TR 242). Complainant then notified the Kansas City Health Department requesting information on the effects of asbestos and informed the Health Department that asbestos was being illegally removed at Respondent's plant (TR 243). The Health Department took Complainant's name and address and told her they would send her literature on asbestos.

When Complainant awoke on March 4, 2000, she discovered Mr. Neff riffling through her mail. When confronted, Mr. Neff admitted that Mr. Jungerman had asked him to go through Complainant's mail to see if she was receiving any information from OSHA or any other government agency pertaining to asbestos. Complainant immediately had Mr. Neff pack his belongings and he left the next morning, March 5, 2000 (TR 244-245).

On March 5, 2000, Complainant noticed that all of the information she received from OSHA and the Cancer Society pertaining to asbestos was missing. On Monday, March 6, 2000, Complainant questioned Mr. Neff at work as to the whereabouts of her mail. Mr. Neff refused to answer her question and just smiled (TR 249).

On March 7, 2000, Complainant noticed that the work area of Stacey Hedrick, a coworker, was in disarray. Leo Wynne, Respondent's foreman of maintenance, informed Stacey it was "none of her damn business" what went on during the night. On March 8, 2000, Complainant noticed that several coworkers had not shown up for work. Complainant also noticed that the tables in her work area were out of place and covered with dust. When questioned about what happened after quitting time, Leo told Complainant it was "none of her damn business" (TR 250-251). Complainant noticed that the insulation on the overhead pipes had been removed and believed the dust over her work area to be asbestos. When Complainant again asked Leo about the "fibers or dust," he again told her that "it was none of [her] damn business, and for [her] to go back to work." (TR 251). Leo then went straight into the office (TR 251). Shortly thereafter, Leo returned and told Complainant to move to the front of the plant. Complainant believed the

transfer was so that Respondent could observe her every move. Complainant was then asked numerous questions by coworkers, Pat and Mildred. Mr. Jungerman subsequently came out of his office on two occasions and spoke with Pat and Mildred individually. At this time, Leo informed Complainant that she was not doing her job (TR 255). Just before her break period, Mr. Jungerman informed Complainant that he wanted to speak with her following break.

After break, Complainant met with Mr. Jungerman and Leo in Mr. Jungerman's office. At this time, Complainant was questioned about phone calls that she allegedly made to Stacey Hedrick, who had just quit (TR 258-260). Complainant was then informed that she was fired, as Respondent did not need someone like her in the plant (TR 261). Complainant then filed a claim with OSHA for discrimination (TR 262).

Claimant states that she was forced to relocate as a result of losing her job. In addition, because of her termination, she was unable to fill her blood pressure medications, her blood pressure worsened, and now requires double the medication to keep it under control. Complainant further states that on one occasion she was rushed by ambulance to the hospital with difficulty breathing. The doctors told Complainant that her difficulty breathing is due to stress (TR 265). Complainant estimates that bills relating to her health as a result of being terminated are approximately $500 (TR 266). Complainant further stated that she was unemployed for three weeks and had to take a job paying sixty cents an hour less. Complainant is now employed at a different location and the hourly wage is forty cents an hour less than she received working for Respondent. Associated with Complainant's move to be near her new job was the cost of various deposits totaling $600. Lastly, Complainant stated that her 1999 Christmas bonus was cut in half as a result of her filing a complaint with OSHA.

On cross-examination, Complainant was questioned about her April 5, 2000 complaint to OSHA. The investigator documented that Complainant stated that she had received disciplinary action for filing complaints with OSHA, EPA, and the Kansas City Health Department (hereinafter KCHD), yet she had not made any of those complaints. Complainant insisted that she did, in fact, make the March 1999 complaint to OSHA (TR 276).

Complainant admitted to receiving two written warnings from Respondent for talking, working at a slow rate, and wandering away from her work station (TR 290). However, Complainant insisted that her actions were in no way inconsistent with the behavior of the other employees at Respondent's plant. Complainant admits that she signed the first written warning and refused to sign the second.

Complainant admitted that the OSHA report failed to mention any complaint about paint or paint fumes and could not explain why (TR 283).

Complainant was shown numerous documents and testified as to the dates she filed complaints with OSHA. The first form was an OSHA discrimination worksheet that was dated September 13, 2000, and stated that on April 4, 2000, Complainant filed a discrimination

complaint. The report stated that it was in reference to a CAA complaint (TR 339, CX 10). The second OSHA discrimination worksheet was dated October 4, 2000, and the CAA statute was marked (TR 338, CX 1).

Lisa Jeter

Ms. Jeter currently works for S&K Industries and has been employed there for approximately a year (TR 69). Ms. Jeter was employed at Baby-Tenda for approximately two years (TR 70). Ms. Jeter was trained by other employees and part of the training was to sit, watch, and talk with the other employee while that employee worked (TR 71).

Ms. Jeter quit her employment with Respondent in March of 2000. Ms. Jeter stated that the reason she quit was because asbestos was being illegally removed from the plant and that she feared for her safety and the safety of her family (TR 71). Ms. Jeter knew that the insulation contained asbestos as she removed a sample of the insulation on or about March 7, 2000, which was her last day of employment for Respondent, and had the sample tested (TR 73). Ms. Jeter filed complaints with the Kansas City Missouri Air Quality Control (hereinafter KCAQCD) and the EPA in March 2000 (TR 76). Ms. Jeter filed the complaints because Respondent failed to warn the employees about the removal of asbestos and afford them an opportunity to protect themselves (TR 77).

Ms. Jeter stated that two fellow employees, Angie Begula and John Gilbertson, told her that Kenneth Neff and Leo Wynne had been helping Mr. Jungerman remove the asbestos at night after the day shift went home (TR 78).

Further, Ms. Jeter testified that she took pictures of boxes before they were removed from the plant that she suspected contained asbestos insulation. Ms. Jeter could not remember if it was the EPA or the Health Department that requested that she take pictures and get samples of the material as it would be needed as proof that Respondent was illegally removing asbestos. Ms. Jeter also recalled the complaint that was made to OSHA in October 1999 (TR 84). According to Ms. Jeter, Mr. Jungerman offered $1000 to anyone that could bring him proof as to who filed the October 1999 complaint with OSHA. Mr. Jungerman also talked with Ms. Jeter privately and stressed that he wanted to know who the “back stabber” in the plant was (TR 85-86).

Under cross-examination, Ms. Jeter admitted to a confrontation between herself and Complainant, but further stated that others in the plant had also been in arguments. Ms. Jeter also admitted being involved in an argument with a fellow employee named Gail. Ms. Jeter denied any knowledge of problems created by Complainant against Pat Daniels, Richard Dover or Bill Collins. Ms. Jeter further admitted that Complainant acted no differently than anyone else in the plant.

John Gilbertson

Mr. Gilbertson is currently employed at Westfield Apple, and has been there for approximately a year and a half (TR 111). Prior to that time, Mr. Gilbertson worked for Baby-Tenda. Mr. Gilbertson worked in various parts of the plant and characterized the work environment as lax, that the employees constantly talked with one another and were out of their work stations regularly (TR 112). Mr. Gilbertson stated that he left Baby-Tenda because he had a new born baby and was fearful of bringing home asbestos due to the removal of asbestos at the plant (TR 121).

Mr. Gilbertson admitted to covering up a table saw before the October 1999 OSHA inspection (TR 114). This was done on direct orders from Mr. Jungerman to Mr. Gilbertson, because a Baby-Tenda employee had been seriously injured operating one of the saws (TR 113). Mr. Gilbertson admitted to deliberately concealing the covered saw from OSHA (TR 116).

Following the inspection by OSHA, Mr. Gilbertson installed guards on the saws. In addition, Mr. Gilbertson noticed a major change in the attitude toward and treatment of Complainant. This shift in the way Complainant was treated after the October 1999 OSHA complaint and inspection was evidenced by the fact that Complainant and Hedrick were issued written warnings for being outside of their work areas when everyone else would be out of their work areas and not written up (TR 119). Mr. Jungerman expressed his belief to Mr. Gilbertson that either Complainant or Stacy (another worker) had turned him in to OSHA. Mr. Gilbertson testified that Respondent made it very clear to him that the reason he wanted to know who turned him in was to fire that person (TR 118-120).

On cross-examination, Mr. Gilbertson reiterated that the rules changed after the October 1999 OSHA inspection for two employees, the Complainant and Stacey (TR 127). Mr. Gilbertson further testified that he did not witness an argument between Complainant and Ms. Jeter. Nor did Mr. Gilbertson hear Complainant tell Ms. Jeter that "Pat said she did crappy work," or that Complainant said she would beat up Richard Dover. Mr. Gilbertson also stated that Mr. Dover was a hot head and did not get along with anyone (TR 129).

On March 7, 2000, Mr. Gilbertson's last day of employment with Respondent, inspectors from EPA, OSHA or the Kansas City Health Department arrived at the plant and were turned away (TR 135). According to Mr. Gilbertson, Complainant had discussed the paint fumes escaping from the paint room into the plant and outside the plant with him but there was nothing he could do to correct the situation (TR 139). Mr. Gilbertson was confused as to exact dates and which agency showed up at the plant on what day. However, he was present when the EPA gained access to the plant and took samples from the paint room, the bathroom and the maintenance room. Further, he was present when Ms. Jeter took pictures of the suspected asbestos insulation that had been removed from various pipes in the plant, and stood as a lookout while Ms. Jeter took some of the insulation to be tested (TR 146-147). Despite the confusion as to the

dates, from the testimony it is clear that all of this occurred prior to the termination of the Complainant, on March 8, 2000.

Annette Beluga

Annette Beluga is a former employee of Baby-Tenda. She worked for Respondent in shipping and receiving for approximately two years and left due to the asbestos in the plant (TR 156). Ms. Beluga felt it was morally wrong to send out goods that she felt were covered with asbestos dust (TR 158). Ms. Beluga stated that the employees talked to one another all the time, as the atmosphere was very lax (TR 159). Further, Ms. Beluga witnessed employees in arguments, loitering, and hanging around and was not aware of anyone ever being discharged because of it (TR 159).

On cross-examination Ms. Beluga testified that she did not hear Complainant tell Ms. Jeter that Pat claimed she did "crappy work," nor did she witness a fight between Ms. Jeter and Complainant. Further, Ms. Beluga was unaware of Complainant constantly trying to slip away from her work area or starting trouble with other employees (TR 161).

Kurtis Rogers

Mr. Rogers worked for Baby-Tenda until late 1999 or early 2000 (TR 167). Mr. Rogers testified that while in the employ of Respondent he was injured using a saw; specifically, a splinter was lodged in his thumb. As a result, Mr. Rogers needed four surgeries to try and correct the problem (TR 168). Mr. Rogers continues to experience pain in his thumb.

On the day of the injury, Mr. Rogers reported the incident to Leo, Respondent's maintenance foreman, who told him to go and report the incident to Mr. Jungerman (TR 168). Mr. Rogers testified that Mr. Jungerman instructed him to go to the hospital, claim the injury happened at home and claim that he had no job so that the hospital would not charge him. Mr. Jungerman informed Mr. Rogers that he would take care of the medical bills; however, Mr. Rogers claims that currently the medical bills remain unpaid (TR 169).

On cross-examination, Mr. Rogers testified that he was unaware that his worker's compensation claim and lawsuit against Baby-Tenda had been abandoned (TR 177). Mr. Rogers reiterated that Mr. Jungerman told him to tell the hospital that the injury occurred at home and that Respondent would take care of the bills (TR 179).

Stacey Hedrick

Stacey Hedrick currently works for Public Storage as a property manager. Prior to her current position, Hedrick was employed at Baby-Tenda for more than two and a half years. While employed at Baby-Tenda, Hedrick worked in close proximity to Complainant, working

back to back, just a few feet apart (TR 181). Hedrick stated that employees walked around and talked with one another frequently during the day, as much as 90% of the time. Further, Hedrick stated that she and Complainant did not walk around and socialize anymore than any other employee (TR 182).

Hedrick testified that after the complaint was made to OSHA in October 1999, management kept a close eye on Complainant (TR 183). According to Hedrick, Complainant was treated differently than everyone else, and after the complaint, Complainant was no longer allowed to talk to other employees (TR 183). Mr. Jungerman requested Hedrick speak to Complainant to find out if she was the one who made the complaint to OSHA because he was going to fire whoever made the complaint (TR 184).

Hedrick left her position with Respondent on March 8, 2000, due to health concerns as a result of the asbestos removal in the plant. Hedrick testified that on March 7, 2000, Mr. Jungerman approached her at the women's restroom and was abusive to her, saying: "[W]hat the [expletive] are you looking for in there . . . ." (TR 215) Ms. Hedrick further testified that she knew that "that's where a lot of the asbestos had been removed from. And that's when he asked me, what the [expletive] were you looking for in there." (TR 215). This confrontation between Ms. Hedrick and Mr. Jungerman occurred just after an inspection party had been turned away from Respondent's facility. Hedrick stated that when Respondent first hired her he stated that no one had ever received unemployment from him and never would (TR 187). Hedrick filed an unemployment claim against Baby-Tenda that was initially denied but granted on appeal (TR 187).[2]

On cross-examination, Hedrick admitted that she had spoken with the EPA and that it was the EPA that told her not to tell Respondent her true reason for leaving (TR 188). Hedrick heard that paint fumes were a large part of the October 1999 OSHA complaint (TR 194). Further, Hedrick stated that on several occasions she had to turn fans on to rid her work area of paint fumes (TR 194). Hedrick was present when Jeter spoke to whom she believed was the EPA on the telephone, and then scraped samples off the pipes for Jeter to take to have tested (TR 198). Hedrick took some of the asbestos out of the boxes that were being removed from the plant and set it underneath something so that it would still be there when the EPA arrived to investigate (TR 212). Hedrick did not recall ever hearing Complainant in a confrontation with Mr. Dover, although numerous employees had disagreements with him (TR 199). Hedrick never

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[2]Ms. Hedrick's testimony at the unemployment compensation hearing was referred to by counsel for the Respondent at the hearing (TR 215). I issued an order to show cause why the decision in that matter should not be included in the record on April 17, 2001. Respondent's objections are unpersuasive. Ms. Hedrick's unemployment compensation hearing was adversarial and a matter of public record, and I include the decision in the record as ALJ EX 3. The findings of fact of that decision corroborate Ms. Hedrick's testimony here and present a picture of Respondent's President, who, having just learned that he was to be inspected again, was determined to find out what the employees were "looking for" and to put a stop to it. The Complainant was terminated the next morning a few hours after complaining to Respondent's maintenance foreman about asbestos dust at her work station.

witnessed Complainant crawling on the floor in order not be noticed out of her work area (TR 201). Further, Hedrick never witnessed a confrontation between Complainant and Ms. Jeter, nor did she see the Complainant threaten Mr. Collins or Mr. Jungerman (TR 201-201).

David Jungerman

David Jungerman is the President of the Respondent, Baby-Tenda, and is responsible for the day-to-day operations of the company (TR 29). Mr. Jungerman testified that after he purchased the plant for the production of baby furniture, the EPA came out and required a "clean up" project because there was lead in the floor. After the clean up, the floor was covered with an epoxy (TR 343).

Mr. Jungerman acknowledged that at first Complainant was a good worker but that after a short period of time she began talking and wandering all over the plant (TR 345). Mr. Jungerman confirmed the authenticity of several hand written notes as his (TR 349). Mr. Jungerman stated that on July 16, 1999, Complainant had words with Mr. Dover and Mr. Jungerman threatened to fire both of them. On July 28, 1999, Mr. Jungerman documented that Complainant allegedly had words with Mr. Neff at which time Complainant threatened to turn Mr. Neff in to his probation officer (TR 350).

Mr. Jungerman testified that Complainant was very loud, and even if one did not personally witness an altercation between Complainant and another employee you would be aware of it as her voice could be heard throughout the plant (TR 354).

In September 1999, Respondent hired Mr. Collins to manage the plant. Mr. Jungerman testified there were problems between Complainant and Mr. Collins (TR 353).

Mr. Jungerman admitted being upset by the October 1999 OSHA inspection. Mr. Jungerman testified that he had run the plant for close to thirty years and never had a problem with OSHA (TR 355). Mr. Jungerman was upset that the person who made the complaint had not come to him first because he would have corrected the problems (TR 356). Mr. Jungerman admitted that he offered a $1000 bonus to the person that admitted to filing the complaint. As a result the employees were all blaming one another (TR 356). Further, Mr. Jungerman claimed that he videotaped this meeting, along with the termination meeting of Complainant.[3]

Mr. Jungerman stated that he did not turn OSHA away when they arrived to inspect the plant nor did he require them to obtain a search warrant. Mr. Jungerman escorted the OSHA investigators throughout the plant and stated that he did not tell any of the employees to hide or

[3]Respondent was required to provide this court with a copy of the video taped meeting. However, by a letter dated November 20, 2001, Respondent advised this court that the video taped meeting had been taped over.

cover up any equipment (TR 358). Further, Mr. Jungerman testified that he never treated Complainant differently after the OSHA inspection (TR 363). As to the Christmas bonus, Mr. Jungerman admitted he cut her Christmas bonus and put a note on her card telling her to be quiet and work (TR 367).

Mr. Jungerman indicated that he had discussed terminating Complainant with Mr. Collins, and that Mr. Collins encouraged him to do so (TR 369). Mr. Jungerman stated that part of the reason that he had not terminated Complainant was that he feared Mr. Neff, who was a good worker, would leave with her (TR 429).

Mr. Jungerman testified that on February 14, 2000, Complainant came to his office with a document outlining all the employees in the plant, the times they were talking instead of working, and the length of time spent wandering around and not working (TR 373). Mr. Jungerman stated he was upset by the document, not at the time spent by employees talking and wandering around, but rather at the person who documented it because that was management's job (TR 375).

On February 17, 2000, Mr. Collins left his employment with Respondent (TR 377). Mr. Jungerman testified that Mr. Collins made threats against him concerning unemployment and severance pay. According to Mr. Jungerman, if he did not grant Mr. Collins' unemployment and give him six weeks severance pay, Mr. Collins would bring up asbestos at the unemployment hearing, making things tough for him (TR 378). As a result of these threats, Mr. Jungerman took the insulation down that might contain asbestos. This was done at night and those participating wore raincoats and masks (TR 381). The insulation was then put in boxes and disposed of (TR 382). Mr. Jungerman stated that the insulation remained intact and that the only dust spread throughout the plant was dust that had accumulated on top of the pipes (TR 381). According to Mr. Jungerman, this all occurred in late February 2000.

On March 7, 2000,[4] prior to the termination of the Complainant, the Kansas City Health Department arrived to inspect the plant but was not admitted (TR 58-60).

On March 8, 2000, Mr. Jungerman terminated Complainant's employment with Baby-Tenda (TR 383) within hours of her complaint to her supervisor, Leo, about asbestos dust in her work area (TR 250-251). Mr. Jungerman testified that this meeting was tape recorded.[5] When asked to produce the tape recording, Respondent testified that the tape disappeared (TR 394). On

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[4]There is some discrepancy as to whether this occurred on March 2 or 7, but, in any event, it occurred prior to the Complainant's termination.

[5] This alleged tape recording was the subject of a Show Cause Order by this court dated April 17, 2002. This same tape was entered into evidence in another court proceeding Case No. WD 59050. Respondent, by reply dated April 27, 2002, argued that the tape used in a subsequent proceeding was not the above mentioned tape.

this same date, Stacey Hedrick quit and two other employees, Lisa Jeter and John Gilbertson, did not show up for work. Coworker Angie Begula had quit less than a week prior (TR 384).

By a matter of hours following the termination of Complainant, the Kansas City Health Department returned to inspect the plant and was admitted (TR 394). The Health Department informed Mr. Jungerman that a complaint had been filed regarding illegal removal of asbestos (TR 394).

A week later Respondent received a fax from OSHA informing it that OSHA had received a report on asbestos in the plant and that Mr. Jungerman needed to immediately investigate and make whatever corrections were necessary (TR 397). Mr. Jungerman hired a professional asbestos abatement company to check the air quality for asbestos and it came back negative. OSHA also sent a team in to monitor the air and the results were negative (TR 397).

The EPA arrived at the Baby-Tenda plant on March 17, 2000, but were not allowed in. After consulting with an attorney, the EPA was allowed in the following Monday to run further tests (TR 403). Mr. Jungerman testified that he did not require the EPA to secure a search warrant (TR 403).

Mr. Jungerman testified that Ms. Jeter planted asbestos in a section of the plant. Further, Mr. Jungerman stated that out of the seventeen test samples taken, only six proved positive for asbestos (TR 404). Mr. Jungerman further testified that he did nothing illegal according to EPA regulations (TR 405).

Mr. Jungerman testified that Complainant never told him that she had filed a complaint with OSHA in October 1999 (TR 406). In addition, Mr. Jungerman stated that Complainant never informed him of the concerns she had regarding defective equipment, paint fumes or asbestos (TR 406). Mr. Jungerman further testified that no one in the plant had informed him that Complainant had made complaints to any agency, nor that she had any concerns regarding the plant (TR 407).

On cross-examination, Mr. Jungerman admitted he was responsible for the lost tapes, but added that the person who stole them was also responsible. Mr. Jungerman went on to state that evidence was planted, masks were put in files and respirators were out that had not been used in eighteen years (TR 417).

Mr. Jungerman testified that Complainant was an “at will” employee and could be fired at any time. However, Mr. Jungerman stated that he did not fire her because he needed to document everything to prevent her from collecting unemployment (TR 417). On March 8, 2000, Respondent had lost between twenty and twenty-five percent of his work force, yet Mr. Jungerman proceeded to fire Complainant (TR 420).

When questioned about the results of the asbestos tests, Mr. Jungerman admitted there were more than six positive results (TR 423). However, in fact, ten out of nineteen tests came back positive for asbestos (TR 423).

Mr. Jungerman denied questioning Complainant at the termination hearing regarding phone calls from Stacey Hedrick or John Gilbertson (TR 426).

Esther Fish

Ms. Fish is a former employee of Respondent and worked at the Baby-Tenda plant during 1999-2000 (TR 430). Ms. Fish testified that Complainant was very disruptive, often left her work station and visited other employees (TR 431). At the time Ms. Fish was employed by Respondent she could see Complainant's work station from her work station. Mr. Collins, the plant manager, was employed by Respondent during the period that Ms. Fish was employed there (TR 432).

Ms. Fish testified that Complainant left her work area daily and would try to hide so that Mr. Collins did not see her. Also, Ms. Fish stated that Complainant was very loud and her voice carried over the entire plant (TR 434-435). Ms. Fish did not personally witness or hear a confrontation between Complainant and Ms. Jeter (TR 435). Ms. Fish further stated that she did not see or hear a confrontation between Complainant and Mr. Neff (TR436).

Ms. Fish stated that she stayed in her work area and did not pay attention to what was going on in the plant (TR 434). Ms. Fish stated that Complainant was not a good worker because she could not keep her supplied with tables to put brackets on (TR 436).

Ms. Fish found the atmosphere at the plant to be friendly and safe (TR 438). Ms. Fish stated employees could talk to each other but were not supposed to walk around (TR 438). Ms. Fish stated that Mr. Collins told her he was quitting because of Complainant. Mr. Collins told Ms. Fish that Complainant was writing down all the time that he and Esther were talking and walking around (TR 437). Ms. Fish further stated that Complainant was constantly spreading rumors about all the employees (TR 440).

Ms. Fish denied ever seeing any dust on the tables. She further denied that her materials were ever moved out of position (TR 440). Ms. Fish also stated that she never heard Respondent state that he was out to get Complainant (TR 441).

On cross-examination, Ms. Fish testified that she worked in two areas of the plant. Ms. Fish worked in close proximity to Pat while putting brackets on the tables and also worked in the paint room putting paint and lacquer on the tables (TR 444). While working in the paint room both painting and applying lacquer, Ms. Fish would open the outside door to get fresh air (TR 444). Ms. Fish further stated that there was no door within the plant separating the paint room from the rest of the plant (TR 445).

Ms. Fish admitted that she frequently missed work, on an average of three days a month. Also, Ms. Fish admitted that she frequently arrived late for work (TR 446-447). Ms. Fish recalled one occasion where she had a verbal altercation with Complainant. Ms. Fish went to Complainant's work area and confronted Complainant concerning a rumor that was alleged to have started with Complainant. Ms. Fish admitted that she was late on that day and thus was not yet on the clock. Further, Ms. Fish admitted she was not written up or disciplined regarding the incident (TR 449-450).

Patricia Daniels

Ms. Daniels worked in the same general area as Complainant and often worked with her (TR 458). Ms. Daniels admitted that Complainant did come to her work area but often it was in order to help her with the work (TR 458). Ms. Daniels never witnessed a confrontation between Complainant and Ms. Jeter, nor did she witness a confrontation between Complainant and Mr. Neff (TR 458-459). Ms. Daniels stated that Complainant was very loud and could be heard a good distance away (TR 461). Ms. Daniels did not recall ever coming to work and finding her area out of order. Nor did Ms. Daniels remember ever coming to work and finding any dust on the tables (TR 462).

Marta Gasser

Ms. Gasser is a current employee of Baby-Tenda and has been employed there for more than five years (TR 468). She had a desk in the administrative office. Ms. Gasser stated that Complainant came to the office on an average of three times a week to speak with Mr. Jungerman (TR 468). Ms. Gasser also stated that Complainant was very loud and that you could hear everything that she said (TR 469).

Ms. Gasser had no recollection of ever seeing a cloud of dust near the offices. She stated that Complainant never mentioned to her that she had filed complaints with OSHA, the EPA or the Kansas City Health Department. Further, Ms. Gasser stated that Complainant never mentioned to her any concerns about asbestos, or paint fumes (TR 471).

Mildred Kessinger

Ms. Kessinger currently works for Baby-Tenda and has been employed there for more than twenty-nine years (TR 476). Ms. Kessinger did not work in an area close to Complainant, and they only had contact when Complainant needed help with a product (TR 476). Ms. Kessinger stated that at first Complainant would get the help she needed and then go back to her work area, but that after a while she started hanging around to talk more and more (TR 477-478).

Ms. Kessinger admitted that Mr. Jungerman approached her and requested that she document every time that she saw Complainant leave her work station to gossip and wander

around but that she refused to do so (TR 480). Ms. Kessinger characterized Complainant as a good worker but that she had issues with talking too much (TR 485).

DISCUSSION

To establish a case of discrimination under the CAA, the Complainant, Ms. Evans, must prove: 1) that she was an employee of a covered employer; 2) that she engaged in protected activity; 3) that thereafter she was subjected to adverse action regarding her employment; 4) that the Respondent knew about the protected activity when it took the adverse action; and 5) that the protected activity was the reason for the adverse action. *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 , slip op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom., Carroll v. U. S. Dep't. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996).

Complainant must prove by a preponderance of the evidence that she engaged in a protected activity which was a contributing factor in an unfavorable personnel decision. If she meets this burden, the burden then shifts to the Respondent to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the protected behavior of the Complainant. Where Respondent articulates a legitimate nondiscriminatory reason for the adverse action, the Complainant must prove that the reasons articulated by the Respondent were pretextual, either by showing that the unlawful reason more than likely motivated Respondent or by a showing that the proffered explanation is not credible and that the Respondent discriminated against her. *Nichols v. Bechel Construction Co.*, 1987-ERA-44 (Sec'y Oct. 26, 1992); *Moore v. U.S. Dep't of Energy*, 1999-CAA-15 (ALJ Jan. 28, 2000).

It is undisputed that Complainant, Ms. Evans, was an employee of Respondent, Baby-Tenda, a covered employer. Nor is it in dispute that the Respondent took adverse actions against the Complainant culminating in the termination of her employment. The primary issues remaining before me concern the nature of the protected activity, the knowledge of the Respondent, and the motivation of the Respondent in taking adverse action against the Complainant.

Protected Activity

Concerns Regarding Paint Fumes

Complainant testified that in October of 1999 she filed a complaint with OSHA regarding several health, safety, and environmental concerns pertaining to Respondent's plant. At issue is whether or not that complaint falls under the CAA. Complaints regarding workplace health and safety issues fall under OSHA and this court does not have jurisdiction to hear such cases.

Complainant testified that she raised three issues in her complaint to OSHA. The first regarded the absence of guards on the various saws in the plant, the second dealt with an injury to an employee at the plant, and the third pertained to the existence of paint fume vapors and

overspray. Complainant concedes that the first two issues in her complaint fall under OSHA jurisdiction and are not before this court. The last issue regarding paint fumes, vapors and overspray being emitted into the air outside of the plant would fall under the CAA. Thus, if in fact Complainant did file a claim with OSHA alleging violations of the CAA, then Complainant's subsequent claim of discrimination as a result of filing that claim would be properly before this court.

The CAA is a "comprehensive scheme for reducing atmospheric pollution." Under the statute, an air pollutant is defined as "any pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air."[6] Ambient air is further defined as "that portion of the atmosphere, external to buildings, to which the general public has access."[7] In order to be protected under the CAA's whistleblower provision, an employee must base his or her complaint on conditions constituting reasonably perceived violations of the act.[8]

Complainant testified that she included in her complaint to OSHA in October 1999 her concern over conditions in the paint room. Specifically, she was concerned because the outside door was kept open allowing paint fumes and overspray from the paint to escape into the outside air. Complainant further stated that she also had concerns regarding the emission of paint fumes into the rest of the plant.

Complainant stated that she had been employed as a painter in a previous job and that she was aware of the safety precautions that should be followed, such as the use of exhaust fans, waterfall, and proper ventilation. Complainant admitted that she had not discussed her concerns with Respondent.

Stacey Hedrick testified that, to her knowledge, paint fumes were a large part of the 1999 OSHA complaint. Further, Ms. Hedrick stated that she often had to put on fans to alleviate her work area of the paint fumes.

Mr. Gilbertson testified that Complainant had discussed her concerns with him regarding paint fumes and overspray escaping from the paint room into the plant and the outside air. Mr. Gilbertson further testified that he informed Complainant he was aware of the problem but that there was nothing he could do.

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[6] 42 U.S.C. § 7602 (g).

[7] *Kemp v. Volunteers of America of Pa., Inc.*, 2000-CAA-6 (ARB Dec. 18, 2000)(quoting 40 C.F.R. § 50.1(e)(2000)).

[8] *Id.* (quoting *Minard v. Nerco Delamar Co.*, 1992-SWD-1 (Sec'y Jan. 25, 1994)).

Several reports were entered into evidence. The U.S. Department of Labor investigated a complaint lodged by Complainant on April 4, 2000, alleging discrimination under the CAA. The Department investigated the allegation, found it to have merit, and informed the Complainant (CX 16). Two DOL Discrimination Case Activity Worksheets dated September 13, 2000, and October 4, 2000, both state that the complaint falls under the CAA. Also, there is the Secretary's Finding and Order, which, after a full investigation, found that the weight of the evidence indicated that Complainant was a protected employee engaged in a protected activity within the scope of the CAA.

Respondent argues that the OSHA complaint and subsequent report that was filed as a result of Complainant's October 1999 complaint, fails to mention paint concerns. Respondent argues that this is so because Complainant never mentioned any concerns she had regarding paint fumes escaping into the outside air. I find this rationale to be lacking and flawed. The mere fact that paint fumes and paint overspray are not addressed in the OSHA report is not dispositive as to whether they were mentioned in the original complaint. The same agency that Complainant filed her initial complaint with, OSHA, is the very agency that subsequently investigated her complaint alleging discrimination under the CAA and found that Complainant had, in fact, been discriminated against as a result of her complaint alleging violations of the CAA. The Complainant's testimony at the hearing addressed her complaints to OSHA regarding the paint fumes and I find her testimony to be credible. In addition, several coworkers confirmed that the Complainant had raised concerns over the paint fumes.

Respondent also argues that the complaint filed by Complainant in October 1999 failed to fall under the CAA because paint fumes are not listed in the Act, and are not toxic. This reasoning is equally flawed. Respondent claims that Complainant must "identify what in the paint or in the paint fumes ... made her believe that Respondent was emitting toxic paint fumes to the outside air."[9] However, as noted above, the *Minard* decision also states that a complainant is protected by the environmental statutes where she has a reasonable belief that the substance was hazardous and regulated as such.[10] Furthermore, "it is unreasonable to expect the average lay person to know what is or is not on the Act's hazardous waste 'list'. Moreover, ... a substance need not be 'listed' by the EPA in order to be deemed hazardous waste under the Act."[11]

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[9] Respondent's Reply Brief at 3 (quoting *Minard v. Nerco Delamar Co.*, 1992-SWD-1 (Sec'y Jan. 25, 1995). (Note: Respondent miscites *Minard* as the Secretary's Decision and Remand Order on January 25, 1995. For reference, this decision was actually issued on January 25, 1994. The Secretary's Final Decision and Order was issued on July 25, 1995).

[10] *Minard v. Nerco Delamar Co.*, 1992-SWD-1 (Sec'y Jan. 25, 1994).

[11] *Id.* In *Minard*, the Complainant believed oil and antifreeze were hazardous waste under the EPA statutes. The fact that neither was included on the EPA's hazardous waste list did not deprive the court of jurisdiction; the Secretary remanded the matter to the ALJ to determine if the complainant's belief was reasonable. *Id.*

Concerns Regarding Asbestos

Respondent argues that even if the complaint filed by Complainant in October 1999 did fall under the provisions of the CAA, there is no nexus between that complaint and the subsequent complaints filed in March 2000. However, this argument is flawed because there need be no nexus to the March 2000 complaints if, as I have found, the October OSHA complaint constituted protected activity under the CAA. In addition, Respondent's argument that there is no connection between the March 2000 complaint and the termination of Complainant is in error.

Complainant testified that she did not file the complaints in March 2000; further, Ms. Jeter testified that she filed the complaints. However, Complainant further testified that she had called the Kansas City Health Department in March of 2000 seeking information on asbestos, and did in fact receive information. Complainant testified that she had informed the KCHD that she was concerned for the safety of her children and grandchildren. While the complaints may very well fall under other statutes such as the EPA or the OSHA, the CAA is also implicated because the complaints articulated more than a strictly occupational hazard. Complainant raised her concerns regarding asbestos leaving the plant with the KCHD in March of 2000 when she called requesting information on asbestos. The actions of the Complainant establish that she was about to commence or cause to be commenced a proceeding under the CAA and, thus, engaged in a second instance of protected activity under the CAA.

The next question is whether the complaint filed by Ms. Jeter regarding asbestos implicates the CAA, and if so, whether it provides yet a third separate and independent basis for the Complainant to be covered. "The CAA seeks to prevent and control air pollution by regulating emissions into the atmosphere. The CAA regulations establish ambient air quality standards for sulfur oxides, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead. 40 C.F.R. Part 50 (1991). Hazardous air pollutants, including asbestos, are also regulated. 40 C.F.R. Part 61 (1991)."[12]

In *Kemp v. Volunteers of America of Pa. Inc.*,[13] the court was faced with much the same situation. Kemp discovered asbestos in the basement of his work place and expressed his concern to management. The court found that the "key threshold question in determining whether Kemp's concerns about asbestos materials in the basement of the VOA thrift store were protected under the CAA is whether he reasonably believed that the alleged asbestos hazard violated EPA regulations or posed a risk to the general public outside the building."[14] The court ultimately concluded that Kemp's actions were not protected under the CAA because his

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[12] *Scerbo v. Consolidated Edison Co. of N.Y., Inc.,* 1989-CAA-2 (Sec'y Nov. 13, 1992)(internal citations omitted).

[13] 2000-CAA-6 (ARB Dec. 18, 2000).

[14] *Id.*

concerns were limited to those persons who worked at the store; nothing in the record suggested Kemp thought the asbestos in the basement posed a threat to the air outside the building.[15]

However, the complaints made to the EPA, KCHD and OSHA by Ms. Jeter articulated a serious concern for the health and safety of those outside the occupational setting. Ms. Jeter expressed concerns for the safety of her family, those outside the plant, along with those customers receiving goods that had been covered with suspected asbestos dust and shipped out of the plant. Ms. Hedrick further reiterated these concerns when she spoke with the various agencies, as did Ms. Beluga. These actions clearly were protected activity under the CAA. As addressed more fully below under the issue of retaliation, this constituted the third instance of protected activity which, by extension, is attributable to the Complainant, Ms. Evans, because the Respondent's President attributed such actions to the Complainant, albeit incorrectly.

Finally, on the morning the Complainant was terminated, she brought her concern regarding the asbestos dust to the attention of Leo Wynne, the Respondent's maintenance foreman. He reacted angrily, moved the Complainant to another location, and went straight to the office. The Complainant was not provided an opportunity to explain her concerns, but only told that it was "none of her damn business" and to return to work. In combination with the testimony of Ms. Jeter, Ms. Hedrick, and Mr. Gilbertson, it is clear that the concern over the asbestos dust included the concern that it would escape from the Baby-Tenda facility to outside of the plant on both the clothes of the employees and the boxes of baby furniture when shipped. This would constitute the fourth instance of protected activity. Shortly thereafter, the Complainant was terminated by Mr. Jungerman in the presence of Respondent's foreman, Mr. Wynn.

Complainant has proven by a preponderance of the evidence that she, as well as Ms. Jeter, Hedrick and Beluga, engaged in a protected activity.

Knowledge of Protected Activity

The undisputed testimony is that Respondent did not have direct, actual knowledge through the Complainant that she had engaged in protected activity in October 2000. Complainant testified that she had not discussed her complaint with Respondent. However, there is ample evidence on the record that Respondent's President, Mr. Jungerman: 1) had constructive or implied knowledge that Complainant had filed the October 1999 complaint; 2) had actual knowledge that Complainant had contacted the KCHD and was about to commence or cause to be commenced a proceeding under the CAA; 3) was informed and reacted angrily to Complainant's concern that asbestos dust was covering her work station; and 4) acted as if he had actual knowledge that Complainant filed the March 2000 complaints with the EPA, OSHA and the KCHD.

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[15] *Id.*

Following the October 1999 complaint filed by Complainant with OSHA, Respondent, through its management, embarked on a crusade to find out who filed the complaint and to terminate that employee. Mr. Jungerman offered a $1000 reward to anyone who could give him the name of the responsible party. Mr. Jungerman also communicated to several employees that he believed the Complainant had in fact made the complaint. In addition, Mr. Jungerman had Mr. Neff search Complainant's mail to see if Complainant was receiving any information on asbestos from any government agency. Mr. Neff then discovered literature from OSHA and other agencies regarding asbestos. Moreover, Complainant's testimony that Mr. Neff admitted checking on Complainant's mail for Mr. Jungerman and, in fact, gave Mr. Jungerman Complainant's mail, was not refuted by Respondent. One can infer from the actions of Mr. Neff regarding Complainant's mail that he took the same from Complainant and gave it to Mr. Jungerman. It is reasonable to infer that based on this information, Mr. Jungerman did in fact believe that Complainant had filed the complaint. Moreover, Mr. Jungerman admitted as much to other employees whose testimony I find to be credible.

An inspector from the EPA documented an interview with Mr. Collins, the plant manger (CX 1). Mr. Collins admitted during the interview that the disciplinary write ups against Complainant were trumped up in that Respondent believed Complainant had filed the complaints and was going to terminate her. Mr. Collins further stated that he covered up a saw that was not in compliance with OSHA regulations at the time of the OSHA inspection, so that it would not be discovered. The statements made by Mr. Collins to the EPA are hearsay, but as I find that his statements so closely corroborate the Complainant's testimony as to the adverse actions taken against her by Mr. Jungerman, I accept Mr. Collins' statement as further evidence which demonstrates the disposition, character and credibility of Mr. Jungerman. Mr. Collins' statements go to the credibility of Mr. Jungerman as well as his awareness that Complainant had made a complaint with OSHA. Further, the EPA inspector's report is consistent with the findings contained in Secretary's Findings and Order (CX 1).

The inference to be drawn from Mr. Jungerman's actions is that he knew Complainant had filed the October 1999 OSHA complaint and may have filed another. On top of this knowledge, on the very day Complainant was terminated, Mr. Jungerman and Mr. Wynne knew the Complainant was asking about the missing pipe insulation and the dust around her work area. The Complainant wanted answers and the Respondent was upset that she was asking questions. Taken as a whole, the evidence clearly establishes that Respondent had knowledge that Complainant had engaged in a protected activity.

Adverse Action

Complainant testified that following the October 1999 complaint to OSHA, Respondent took adverse actions against her. These actions included isolating her from other employees, watching her at all times, moving her work location, cutting her bonus in half, having other employees spy on her, having her live-in boyfriend go through her mail, having her written up for

engaging in activity that other employees also engaged in but were not written up for, and, ultimately, her termination.

Respondent argues that it would have terminated Complainant even if she had not filed a complaint with OSHA. Mr. Jungerman testified that Complainant was extremely loud, a trouble maker, always wandering around, and a poor worker. Mr. Jungerman further testified that Complainant had engaged in arguments with Mr. Dover, Ms. Jeter, Mr. Neff, Ms. Daniels and others.

"The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action."[16] Where the complainant satisfies this test, the burden of production then shifts to the Respondent, who must "articulate a legitimate business reason for the adverse action."[17] Where the employer meets its burden, the complainant must then prove that the employer's stated reasons were pretextual, which can be done by a showing that either "the unlawful reason more than likely motivated the employer" or that "the proffered explanation is not credible and that the employer discriminated against him."[18]

None of the allegations put forth by Respondent can be reconciled with the testimony offered. Not one employee testified that he or she witnessed Complainant arguing with Ms. Jeter, Mr. Dover, Mr. Neff or Ms. Daniels. Although several witnesses testified that they had heard rumors relating to several incidences involving Complainant, none of the witnesses actually witnessed or heard any of the alleged incidences first hand.

Mr. Jungerman testified that he did not have to actually witness a problem involving Complainant first-hand because she was so loud that she could be heard throughout the plant. One must question, then, why none of the witnesses could testify about hearing any arguments or disturbances involving Complainant. Ms. Jeter, under cross examination by Respondent's counsel, admitted that she had been involved in an argument with Complainant, but added that she was also involved in an argument with another employee named Gail. Further, Ms. Jeter testified that she had no knowledge of any problems created by Complainant against Pat Daniels, Richard Dover or Bill Collins. Ms. Jeter also stated that Complainant acted no differently than any other employee. Ms. Beluga testified that she witnessed several employees in arguments, loitering, and hanging around and was not aware of any employee ever being discharged as a result. Ms. Beluga testified that she did not witness an argument between Complainant and Ms. Jeter, nor was she aware of Complainant constantly trying to slip away from her work station. Mr. Gilbertson testified that there was a shift in treatment towards Complainant after the October

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[16] *Moore v. U.S. Dep't of Energy*,1999-CAA-15 (ALJ Jan. 28, 2000)(citing *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996)).

[17] *Moore v. U.S. Dep't of Energy*,1999-CAA-15 (ALJ Jan. 28, 2000).

[18] *Id.*

1999 complaint to OSHA. Mr. Gilbertson never witnessed or heard any altercation between Complainant and Ms. Jeter, Mr. Dover or Ms. Daniels. Further, with regard to Mr. Dover, Mr. Gilbertson testified he was a "hot head" and no one got along with him.

The credibility of Mr. Jungerman is further challenged by his inconsistent statements in the various reports entered into evidence. Mr. Jungerman told an OSHA inspector that he was being set up by disgruntled employees (CX 25). Later he told another inspector that the EPA had admitted to him that asbestos evidence had been planted in the plant (CX 241). Mr. Jungerman even accused one inspector of planting the asbestos herself to ruin Respondent's business (CX 240). When first questioned by OSHA and EPA inspectors as to whether he had removed asbestos insulation from the plant, he informed them that he had not. Only later did Respondent admit that he had (CX 238). Further, Mr. Jungerman testified that he allowed inspectors from the EPA, KCHD and OSHA to inspect his plant and that they were not turned away or required to secure a search warrant. However, the reports from the inspectors and three employees contradict that testimony. The issue is not whether the inspectors had to secure a search warrant, but rather whether they were allowed to enter the premises on the first day that they arrived, as Respondent testified. The evidence supports a finding that the inspectors were, in fact, turned away on their first attempt to enter and inspect the plant.

Mr. Jungerman testified that he did in fact offer a $1000 bonus to any employee who turned in the employee who filed the complaint with OSHA. However, Mr. Jungerman stated that he only wanted to talk to that employee and did not offer the bonus to entice one employee to turn in another so as to fire the employee who made the complaint. The weight of the evidence, both in agency reports and testimony, refutes this account. The evidence establishes that Mr. Jungerman embarked on a course to seek out the employee who made the October 1999 complaint and to fire that employee. The evidence further establishes that Mr. Jungerman believed that employee to be Complainant.

Mr. Jungerman further testified that the reason he documented every move of Complainant and had other employees watch her for him was to prevent Complainant from being granted unemployment compensation. Mr. Jungerman further boasted that no one in thirty years of business had collected unemployment from his business.

More telling, however, is Mr. Jungerman's timing. He began documenting the Complainant only after the October inspection and terminated Complainant the day after inspectors again sought entry. Over the course of five months, Respondent embarked on a retaliatory course of action against Complainant.[19] For example, Complainant's work location was moved to the front of the plant so that Respondent could keep a watchful eye on her. After the October 1999

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[19] *See, e.g., Tyndall v. U.S. EPA*, 1993-CAA-6 (ARB June 14, 1996), which dealt with the issue of proximity in time. The adverse actions alleged by Tyndall took place between two and eleven months after the complainant's protected activity. *Id.* The court ruled that "the temporal proximity alleged here is sufficient to raise an inference of causation and therefore establish a *prima facia* case." *Id.*

complaint, Complainant was no longer allowed to socialize at work even though the rest of the employees continued to do so. Complainant's Christmas bonus was cut in half and she was given a note that read if she kept her mouth shut she would do better. Complainant's live-in boyfriend spied on her and riffled through her mail to gain information to give to Respondent. Testimony by coworkers establishes that Respondent believed that Complainant had made the October 1999 complaint.

By the time of the second series of complaints in March of 2000, Respondent had gathered the information that Complainant received from OSHA and other agencies regarding asbestos. Further, inspectors had been to the plant to investigate the complaints one day prior to the termination of Complainant. Moreover, the termination occurred only hours after Complainant had complained about asbestos dust at her work area. At a time when Mr. Jungerman just lost 25% of his work force and should have been concerned with holding on to the remainder, Mr. Jungerman instead chose to cut further. Complainant's behavior on that date was no different than it had been on any other occasion, except for her expression of concern over the asbestos dust at her work station. To take such drastic action in the midst of safety complaints and in the shadow of an impending inspection more than suggests a nexus. Based upon my observations of the behavior, bearing, manner, appearance and demeanor of Respondent's witnesses, particularly that of Mr. Jungerman, and upon a review of the entire record, it is impossible for this court to believe that Respondent would have terminated Complainant's employment at the time and place that it was terminated in the absence of the protected activity.

Respondent raises several arguments in relation to the April 2000 complaint to the EPA, OSHA and KCHD. Respondent first argues that there is no nexus between the October 1999 OSHA complaint and the April 2000 complaint because Complainant did not make the April 2000 complaint and thus is not covered under the CAA.

Respondent is incorrect. First, there is a nexus between the two complaints. Complainant was terminated in March 2000 not only for her actions, but in part for the actions of Ms. Jeter. However, as noted above, the actions taken against Complainant were taken under the belief that it was Complainant who not only contacted the KCHD regarding asbestos dust, but also filed the March 2000 complaints.

I am of the opinion that the CAA whistleblower protections must extend to persons erroneously believed to have filed complaints. If an employer is free to fire anyone other than the complainant, then that employer is free to eviscerate the CAA. In fact, taking adverse actions against coworkers, whether intentional or unintentional, may be more effective than retaliating only against the complainant because it encourages fellow employees to turn on the complainant to protect their own jobs. Whistleblower statutes are premised on the fact that some employees may hesitate to complain of safety and health issues for fear of retaliation. Even greater is that fear when the employee believes that retaliation will follow if any employee complains. The protection of the CAA must shield employees from both intentional or unintentional adverse actions, because in either case, such retaliation chills the interest of employees to exercise their

rights. As such, the Respondent acted adversely to the Complainant with the clear intent of chilling the exercise of her rights under the CAA.

In *Reich v. Cambridgeport Air Systems*, two employees, and close friends (Richardson and Roche), were fired because Richardson had allegedly filed a complaint with OSHA.[20] The Court of Appeals affirmed the district court's finding that Roche was discharged because he was a friend of Richardson's, not for his own protected activity.[21] The court specifically noted the district court's finding that the most likely explanation for Roche's discharge was to convince other employees "not to associate with health and safety activists."[22] After reviewing the entire record, including the employees' relationship and the close proximity in time of their terminations, the court upheld the lower court's finding, stating, "We cannot say the court clearly erred in finding that Roche was discharged because of his connection with Richardson."[23]

I therefore find that the actions taken by Respondent against Complainant were pretextual. Respondent set out to terminate Complainant for four reasons, each of which would independently suffice to support a finding that the Respondent acted in violation of the CAA in terminating the Complainant. Respondent embarked on a course to terminate the Complainant (1) because she filed the October complaint with OSHA for, *inter alia*, concern over paint fumes in the ambient air; (2) because the Complainant was collecting information on asbestos exposure in preparation to commence an action under the CAA; (3) because Respondent erroneously suspected that Claimant had filed a complaint relating to asbestos dust; and (4) because the Complainant complained of asbestos dust at her work station. In so doing, the Respondent tried to cover up its motives and intentions under the guise that Complainant would have been terminated even if she had not participated in a protected activity.

Relief

Back Pay

The Secretary's Findings and Order directed the Respondent to pay all back pay. Complainant testified that she was out of work for three weeks and her hourly rate working for Respondent was $5.50. The lost wages for the three weeks is $5.50/hour X 8 hours per day X 15 days = $600.60. However, back-pay awards "cover total earnings, including overtime, shift differentials, premium pay, health and medical benefits, bonuses, stock purchase options and other fringe benefits. Raises that an employee would have earned during the back-pay period

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[20] *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1188-1189 (1st Cir. 1994).

[21] *Id.* at 1188.

[22] *Id.* at 1189.

[23] *Id.*

will also be included in the calculation of the total amount."[24] "The purpose of a back pay award is to make the employee whole, that is to restore the employee to the same position [she] would have been in if not discriminated against."[25] A Complainant is thus entitled to receive "the wages and benefits she would have received but for the illegal discrimination," including salary loss, as well as "lost overtime, shift differentials, and fringe benefits such as sick pay, annual leave and vacation pay."[26]

The total owed Complainant, then, includes all raises she would have received, all bonuses and any other benefits. Such back pay will be reduced by Claimant's actual earnings since her termination. The Respondent shall be further obligated to pay the Complainant the difference of her expected earnings with Baby-Tenda and her actual earnings until such time as the Respondent offers Complainant the right to return to work at Baby-Tenda.

Compensatory Damages

The whistleblower statutes permit compensatory damages.[27] The purpose of awarding compensatory damages is to make the complainant whole. They are designed to compensate for direct pecuniary loss, as well as impairment of reputation, personal humiliation, mental anguish and suffering, and other like harms.[28]

"To recover compensatory damages, Complainant has the burden of showing that she experienced mental, or emotional distress and that the hostile working environment caused the mental and emotional distress."[29] For instance, in *Pickett*, the court determined that the complainant was entitled to compensatory damages because such awards were permitted under the

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[24] *Pickett v. Tennessee Valley Authority,* 2001-CAA-18 (ALJ Feb. 7, 2002).

[25] *Id.* at 44 (citing *Blackburn v. Metric Constructors, Inc.*, 1986-ERA-4 (Sec'y Oct. 30, 1991), slip op. at 11). *See also Pillow v. Bechtel, Inc.*, 1987-ERA-35 (Sec'y July 19, 1993).

[26] *Pickett v. Tennessee Valley Authority,* 2001-CAA-18 (ALJ Feb. 7, 2002)(citing *Crabtree v. Baptist Hosp. of Gadsden, Inc.*, 749 F.2d 1501 (11th Cir. 1985)).

[27] *See, e.g., Nolan v. AC Express,* 1992-STA-37 (Sec'y Jan.17, 1995).

[28] *Leveille v. New York Air Nat'l Guard,* 1994-TSC-3 & 4 (ARB Oct. 25, 1999).

[29] *Smith v. Esicorp, Inc.*, 1993-ERA-16 (ALJ Feb. 26, 1997)(citing *Blackburn v. Martin,* 982 F.2d 125, 131 (4th Cir. 1992)).

environmental whistleblower statutes for emotional pain and suffering, or mental anguish.[30] In order to recover compensatory damages, a whistleblower complainant must demonstrate she

experienced emotional distress, which was caused by the respondent's adverse actions.[31] However, it is not necessary to provide expert testimony to establish the existence of mental distress resulting from an employer's hostile working environment.[32]

Complainant testified that she suffered from anxiety or panic attacks following her termination and was rushed by ambulance to the hospital. In addition, because of her termination, Complainant was unable to purchase blood pressure medication and, as a result, she must now take twice the dosage of her blood pressure medication. Further, Complainant was forced to relocate to secure new employment. For a period of three weeks following her termination, Complainant had none of her necessary medication. While not providing an expert to testify on her behalf, after witnessing Complainant, her demeanor and truthfulness, it is apparent that Complainant has suffered mental anguish and stress.

It must not be overlooked that Complainant also suffered during her remaining five months of employment with Respondent. Complainant was isolated from other workers and her actions were scrutinized by Respondent. Complainant's live-in boyfriend stole her mail in order to accommodate and please Respondent. Further, Respondent offered a $1000 reward to obtain proof that Complainant had filed the OSHA complaint, and tried to enlist other employees in his endeavor to illegally fire Complainant.

For the reasons stated above, I find that Complainant is entitled to compensatory damages. The Secretary and the Administrative Review Board "have long held that compensatory damage awards for emotional distress or mental anguish should be similar to awards made in other cases involving comparable degrees of injury."[33] A vast array of award amounts have been upheld.[34] For example, in *DeFord v. Tennessee Valley Authority*, the claimant received $10,000

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[30] *Pickett v. Tennessee Valley Authority*, 2001-CAA-18 (ALJ Feb.7, 2002). *See Deford v. Secretary of Labor*, 700 F.2d 281 (1983) (analogous provision of the ERA); *Nolan v. AC Express*, 1992-STA-37 (Sec'y Jan. 17, 1995)(analogous provision of the STA).

[31] *Doyle v. Hydro Nuclear Services*, 1989-ERA-22 (ARB Sept. 6, 1996).

[32] *Smith v. Esicorp, Inc.*, 1993-ERA-16 (ALJ Feb. 26, 1997)(citing *Busche v. Burkee*, 649 F.2d 509, 519 (7th Cir. 1981)).

[33] *Leveille v. New York Air National Guard*, 1994-TSC-3 & 4 (ARB Oct. 25, 1999).

[34] *See, e.g., McCuistion v. Tennessee Valley Authority*, 1989-ERA-6 (Sec'y Nov. 13, 1991).

in damages for chest pains, difficulty with swallowing, indigestion, sleeplessness, and general anxiety and depression.[35] In *Aumiller v. University of Delaware*, the claimant likewise received $10,000 for anxiety neurosis, insomnia, nightmares, fatigue and severe financial difficulties.[36] However, in *Muldrew v. Anheuser-Busch, Inc.*, the Court of Appeals held an award of $50,000 was reasonable for emotional distress and mental suffering for the complainant's loss of his house and his car, and marital difficulties that resulted.[37] Likewise, in *Wulf v. City of Wichita*, the court granted an award of not greater than $50,000 to a plaintiff who was angry, scared, frustrated, depressed, under emotional strain, and experienced financial difficulties as a result of losing his job.[38]

As noted above, the Complainant here suffered physically, mentally and emotionally as a result of the retaliation by Respondent. Moreover, she suffered pecuniary loss by having to relocate and take employment at a lower wage. Thus, in comparing the previous cases to this one, I find an award of $25,000 is warranted.

Exemplary Damages

Punitive damages are a discretionary award. In order to determine if exemplary awards are appropriate, courts have used the two-step analysis set out in the Restatement (Second) of Torts §§ 908 (1979).[39] Under this analysis, the threshold inquiry focuses on the wrongdoer's state of mind, and requires both the "intent and the resolve actually to take action to effect harm."[40] The wrongdoer, then, must have demonstrated "reckless or callous indifference to the legally protected rights of others," and engaged in "conscious disregard of those rights."[41] Once the state of mind is shown, the judge must then determine if the award is necessary for

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[35] *DeFord v. Tennessee Valley Authority*, 1981-ERA-1 (Sec'y Apr. 30, 1984).

[36] *Aumiller v. University of Delaware*, 434 F. Supp. 1273, 1309-1311 (D. Del. 1977).

[37] *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992 and n.1 (8th Cir. 1984).

[38] *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989).

[39] *See, e.g., Johnson v. Old Dominion Security*, 1986-CAA-3, 4 & 5 (Sec'y May 29, 1991).

[40] *Id.*

[41] *Id.*

deterrence.[42] Exemplary damage awards serve as punishment for reckless and outrageous conduct and to deter such conduct in the future.[43]

Factors in determining whether punitive damages should be awarded and in what amount, include:

1: The egregious nature of the conduct,
2: Its duration and frequency,
3: The defendant's response after being informed of the discrimination, and

4: The financial status of the defendant.[44]

In *Sayre v. Alyeska Pipeline Service Co.*, the ALJ awarded punitive damages because the Respondent intentionally discriminated against Complainant after she engaged in a protected activity.[45] There the Complainant was harassed, lost her job, and suffered mental and emotional stress as a result.[46] Similarly, in *Varnadore v. Oak Ridge Nat'l Laboratory*, the ALJ awarded exemplary damages after finding that the employer intentionally put the claimant "under stress with full knowledge that he was a cancer patient recovering after extensive surgery and lengthy chemotherapy.[47]

In the present matter, Respondent retaliated against Complainant from October 1999, when she filed a complaint with OSHA, until March 2000 (CX 1). The period of adverse actions taken by Respondent against Complainant lasted six months. In the course of that time, Respondent had another employee, the Complainant's then-boyfriend, steal Complainant's mail (TR 244), had fellow employees document Complainant's movements, isolated and moved Complainant's work area (TR 251) and offered to reward fellow employees if they could prove Complainant filed the complaint with OSHA (TR 356). Further, Respondent cut Complainant's Christmas bonus in half (CX 1) and ultimately fired her.

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[42] *Varnadore v. Oak Ridge Nat'l Laboratory*, 1992-CAA-2 (ALJ June 7, 1993).

[43] *See generally*, *Smith v. Wade*, 461 U.S. 30, 54 (1983) (quoting Restatement (Second) of Torts §§ 908(1) (1977)).

[44] *Pickett v. Tennessee Valley Authority*, 2001-CAA-18 (ALJ Feb. 7, 2002) (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999)).

[45] *Sayre v. Alyeska Pipeline Service Co.*, 1997-TSC-6 (ALJ May 18, 1999).

[46] *Id.*

[47] *Varnadore v. Oak Ridge Nat'l Laboratory*, 1992-CAA-2 (ALJ June 7, 1993).

This type of scrutiny and retaliation would increase the stress on any reasonable person. In this case, actions taken against Complainant had that very impact. On one occasion, Complainant experienced difficulty breathing and had to be rushed to the hospital; doctors later noted this episode was due to stress (TR 265). As a result of her termination, Complainant was unable to fill her blood pressure medication. Her condition thus worsened and she now requires double the medication to treat her condition.

Respondent has not displayed any remorse for his actions, nor has Respondent offered to rehire Complainant.[48] Further, Respondent offered a nominal sum of money to Complainant to make her feel as though she had won (CX 1). Respondent acted with intent and resolve to effect harm. This type of behavior is the kind that the court should deter in the future.

Therefore, due to the lengthy duration of the harassment and the egregious nature and response by Respondent, I find an award of punitive damages is justified.

As with compensatory damages, a comparative analysis is used to calculate damages. In *Sayre*, the court awarded exemplary damages in the amount of $2,500. By contrast, in *Varnadore*, the ALJ awarded $20,000 in exemplary damages. I believe this case is akin to the situation in *Varnadore*. Unlike *Sayre*, here Complainant was not rehired by Respondent. However, Respondent's covert and retaliatory actions were severe enough to liken the resulting stress to that in *Varnadore*. Thus, I find an award of $20,000 in exemplary damages justified.

Attorney fees

The environmental acts entitle a winning complainant to an award of the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint, 42 U.S.C. § 7622 (b)(2)(B) (CAA). At this time there is no fee petition before me.

FINDINGS OF FACT

Accordingly, in view of the foregoing, and upon the entire record, I find as follows:

1. Complainant was an employee of the Respondent, Baby-Tenda, a/k/a Babee-Tenda, a/k/a Tenda from on or about March 1, 1999 until being terminated on or about March 8, 2000.

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[48] In *Sayre*, the ALJ noted that the complainant was eventually rehired by the Respondent. That action was a mitigating factor on the exemplary damages award.

2. On or about October 1999, Complainant filed a complaint with OSHA regarding equipment safety issues and paint fumes escaping from Baby-Tenda through open doors into the ambient air.

3. Respondent knew or believed that Complainant filed the October 1999 complaint with OSHA.

4. OSHA inspected the premises of Baby-Tenda and found eight safety violations.

5. Mr. Jungerman is the owner, manager, and president of Baby-Tenda and oversees all plant operations.

6. Following the OSHA inspection, Mr. Jungerman offered $1000 to the employee who made the complaint to OSHA if they came forward, or, in the alternative, to anyone who knew the identity of the person who filed the complaint and gave him that person's name.

7. On or about March 2, 2000, the EPA and OSHA commenced an investigation against Baby-Tenda as a result of further complaints regarding occupational safety, asbestos exposure, and dumping issues.

8. Respondent knew Complainant was collecting information on asbestos exposure in preparation to commence an action under the CAA.

9. Respondent knew that Complainant had complained about asbestos dust over her work station.

10. Respondent knew, prior to terminating Complainant, that inspectors had sought entry into the Baby-Tenda facility and that their return was imminent.

11. Respondent erroneously suspected that Claimant had filed a complaint which was the cause of the impending inspection.

12. Respondent's President, Mr. Jungerman, tried to cover up his motives and intentions under the guise that Complainant would have been terminated even if she had not participated in safety complaints.

13. On or about April 5, 2000, Complainant filed a timely discrimination complaint with OSHA.

14. OSHA investigated the complaint and I affirm OSHA's findings based on the evidence that Christine Evans was a protected employee, engaging in a protected

activity within the scope of the CAA, and that discrimination as defined and prohibited by the statute was a factor in the actions which comprised Christine Evans' complaint.

RECOMMENDED ORDER

Accordingly, in view of the foregoing, and upon the entire record, I issue the following Recommendations:

1. Respondent shall offer Complainant full time employment at a rate of pay that reflects all raises, bonuses and other benefits that Complainant would be entitled to receive had her employment not been terminated. Such offer, once made, shall remain open for a period of thirty days. Complainant is under no obligation to accept such offer as Respondent created a hostile work environment.

2. Respondent, Baby-Tenda, a/k/a Babee-Tenda, a/k/a Tenda shall pay back pay to Complainant as outlined in this opinion. Counsel for Complainant shall file a petition for all back pay within thirty (30) days after the filing of the Recommended Decision and Order with service on Counsel for Respondent.

3. Respondent, Baby-Tenda, a/k/a Babee-Tenda, a/k/a Tenda, shall immediately pay Complainant, Christine Evans, the sum of $25,000 as compensatory damages for the emotional suffering and distress caused to her by the adverse actions of Respondent.

4. Counsel for Complainant shall file a Petition for Fees and costs within thirty (30) days after the filing of the Recommended Decision and Order for all legal services rendered with service on Counsel for Respondent. Respondent may file objections, if any, to said application for fees and costs within fifteen (15) days of receipt. Within fifteen (15) days after receipt of any such objections from Respondent, Counsel for Complainant may file a response thereto.

5. Respondent shall expunge Complainant's work records of any information regarding Christine Evans' involvement in protected activity and any record of disciplinary action surrounding this matter, including all written and or verbal warnings.

6. Respondent shall pay the sum of $500 for medical bills incurred by Complainant as a result of her termination. Further, Respondent shall pay the sum of $600 which

represents the cost of Complainant having to relocate as a result of her termination.

7. Respondent shall pay to Complainant the additional sum of $20,000 in exemplary damages.

8. Respondent shall post this decision at the Baby-Tenda facility where all employees can see it for a period of 90 days.

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ROBERT J. LESNICK
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed.Reg. 6614 (1998).